IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Matthew Rolph, *Plaintiff,* **v.** **Hobart And William Smith College** *Defendant.*	**CIVIL NO. 6:16-cv-06515**

ORDER

AND NOW, this _______ day of _____________, 2016, after consideration of Defendant Hobart and William Smith Colleges' Motion to Dismiss Plaintiff's First Amended Complaint and any response thereto, it is HEREBY ORDERED that the Plaintiff's First Amended Complaint is DISMISSED WITH PREJUDICE.

BY THE COURT:

____
Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Matthew Rolph, *Plaintiff,* v. **Hobart And William Smith College** *Defendant.*	:	**CIVIL NO. 6:16-cv-06515**

DEFENDANT HOBART AND WILLIAM SMITH COLLEGES' NOTICE OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Relief Sought:	An Order, pursuant to Fed. R. Civ. P. 12(b)(6), dismissing Plaintiff's Amended Complaint on the merits and with prejudice; costs and disbursements of the motion and such other and further relief as the Court deems just and proper.
Grounds for the Request:	Fed. R. Civ. P. 12(b)(6) and statutory and decisional law.
Supporting Papers:	Memorandum of Law in Support of Defendant's Motion to Dismiss Plaintiff's Amended Complaint; Exhibit A (Defendants-Appellees/Cross Appellants' Petition for Panel Rehearing or Rehearing En Banc in *Doe v. Columbia University*, No. 15-1536, 2016 U.S. App. LEXIS 13773 (2d Cir. July 29, 2016); Exhibit B (U.S. Department of Education April 4, 2011 "Dear Colleague Letter").
Return Date for Motion:	To be set by the Court.
Reply Papers:	Defendant intends to file and serve reply papers.
Oral Argument:	Requested.

Dated: September 26, 2016

/s/ Angelo A. Stio

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WESTERN DISTRICT OF NEW YORK

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DEFENDANT HOBART AND WILLIAM SMITH COLLEGES' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Hobart and William Smith Colleges, through their undersigned counsel, hereby moves the Court to dismiss the Plaintiff's First Amended Complaint with prejudice for the reasons set forth in the accompanying Memorandum of Law. Defendant requests oral argument on this Motion.

Dated: September 26, 2016

Respectfully submitted,

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WESTERN DISTRICT OF NEW YORK

Matthew Rolph, *Plaintiff,* **v.** **Hobart And William Smith College** *Defendant.*	:	**CIVIL NO. 6:16-cv-06515**

DEFENDANT HOBART AND WILLIAM SMITH COLLEGES' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Dated: September 26, 2016

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ALLEGATIONS IN THE AMENDED COMPLAINT 2

A. ***Jane Roe Claims That Rolph Sexually Assaulted Her, Immediately Tells Her Friends and Promptly Reports the Assault to the Colleges*** 2

B. ***A Civil Court Grants a Temporary Order of Protection for Jane Roe and The District Attorney Charges Plaintiff With a Criminal Sex Act*** 4

C. ***HWS Conducts an Investigation Using an Outside Attorney Who Was Certified in Title IX Investigations*** 4

D. ***A Sexual Grievance Panel Finds Plaintiff Responsible for Non-Consensual Sexual Contact and Permanently Dismisses Him from HWS*** 6

E. ***Public Discussion Concerning HWS' Handling of Other Sexual Assault Cases Does Not Occur Until After Rolph is Expelled*** 6

III. ARGUMENT 7

A. ***Standard on Motion to Dismiss*** 7

B. ***Plaintiff Fails to State a Plausible Claim of Gender Discrimination Under Title IX*** 8

C. ***Plaintiff's State Law Claims Challenging His Expulsion Should Have Been Brought as an Article 78 Proceeding and are Time-Barred*** 15

D. ***Plaintiff Fails to State a Plausible Claim for Breach of Contract*** 16

E. ***Plaintiff Fails to State a Plausible Claim for Promissory Estoppel*** 20

F. ***Plaintiff Fails to State a Plausible Claim for Negligence*** 21

G. ***Plaintiff Fails to State a Plausible Claim for Negligent Infliction of Emotional Distress*** 22

IV. CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Ansari v. New York Univ., No. 96 Civ. 5280 (MBM), 1997 U.S. Dist. LEXIS 6863 (S.D.N.Y. May 12, 1997) 15

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 7, 10

Austin v. Univ. of Or., No. 6:15-CV-02257-MC, 2016 U.S. Dist. LEXIS 121198 (D. Or. Sept. 8, 2016) 10

Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC, 692 F.3d 42 (2d Cir. 2012) 22

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) 7, 10

Cyberchron Corp. v. Calldata Sys. Dev., 47 F.3d 39 (2d Cir. 1995) 21

Davis v. Monroe Cty. Bd. of Education, 526 U.S. 629 (1999) 8, 10

De Sesto v. Slaine, No. 15-cv-1118 (AJN), 2016 U.S. Dist. LEXIS 35312 (S.D.N.Y. Mar. 18, 2016) 23

Doe v. Columbia University, No. 15-1536, 2016 U.S. App. LEXIS 13773 (2d Cir. July 29, 2016) 8, 9, 10, 11

Doe v. Regents of the Univ. of Cal., No. 2:15-cv-02478-SVW-JEM, 2016 U.S. Dist. LEXIS 123612 (C.D. Cal. July 25, 2016) 12, 13, 14

Doe v. Univ. of Cincinnati, No. 1:15-CV-681, 2016 U.S. Dist. LEXIS 37924 (S.D. Ohio Mar. 23, 2016) 11

Downs v. Bel Brands USA, Inc., No. 4:14-CV-00016-JHM, 2014 U.S. Dist. LEXIS 118066 (W.D. Ky. Aug. 25, 2014) 21

Evans v. Columbia Univ., No. 14-cv-2658 (NSR), 2015 U.S. Dist. LEXIS 48768 (S.D.N.Y. Apr. 13, 2015) 18

Ezold v. WellPoint, Inc., No. 3:06CV00381 (AWT), 2007 U.S. Dist. LEXIS 33159 (D. Conn. Apr. 28, 2007) 21

Faiaz v. Colgate Univ., 64 F. Supp. 3d 336 (N.D.N.Y 2014) 17

Ferrari v. Keybank N.A., No. 06-cv-6525, 2009 U.S. Dist. LEXIS 160 (W.D.N.Y. Jan. 5, 2009) 20

Page(s)

Fillmore East BS Fin. Subsidiary LLC v. Capmark Bank, No. 11 Civ. 4491 (PGG), 2013 U.S. Dist. LEXIS 47608 (S.D.N.Y. Mar. 30, 2013).............22

Flaim v. Med. Coll. of Ohio, 418 F.3d 629 (6th Cir. 2005)...14

Fraad-Wolff v. Vassar College, 932 F. Supp. 88 (S.D.N.Y. 1996) 17

Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992)...8, 10

Gally v. Columbia Univ., 22 F. Supp. 2d 199 (S.D.N.Y. 1998) 17, 18

Gebser v. Lago Vista Independent School Dist., 524 U.S. 274 (1998).....................................8, 10

Gorman v. Univ. of R.I., 837 F.2d 7 (1st Cir. 1988) 14

Gouda v. Harcum Junior Coll., No. 14-5456, 2015 U.S. Dist. LEXIS 72562 (E.D. Pa. June 4, 2015)...22

Hirsch v. Arthur Andersen & Co., 72 F.3d 1085 (2d Cir. 1995) 8

Johnson v. Temple Univ., No. 12-515, 2013 U.S. Dist. LEXIS 134640 (E.D. Pa. Sept. 19, 2013) 14

Jones v. Trustees of Union College, 92 A.D.3d 997 (N.Y. App. Div. 3d Dep't 2012) 17

Kant v. Columbia Univ., No. 08 Civ. 7476 (PGG), 2010 U.S. Dist. LEXIS 21900 (S.D.N.Y. Mar. 9, 2010) 20

Kickertz v. New York Univ., 110 A.D.3d 268 (N.Y. App. Div. 1st Dep't 2013)..........................15

Knelman v. Middlebury Coll., 898 F. Supp. 2d 697 (D. Vt. 2012)...17, 18

Ludlow v. Northwestern Univ., 125 F. Supp. 3d 783 (N.D. Ill. 2015)..12

Mitchell v New York Univ., No. 150622/2013, 2014 N.Y. Misc. LEXIS 105 (N.Y. Sup. Ct. Jan. 8, 2014)...16

Miyahara v. Majsak, 117 A.D.3d 812 (N.Y. App. Div. 2d Dep't 2014).......................................15

Ornstein v. New York City Health & Hosps. Corp., 10 N.Y.3d 1 (N.Y. 2008)............................23

Osteen v. Henley, 13 F.3d 221 (7th Cir. 1993) 14

Padiyar v. Albert Einstein Coll. of Medicine of Yeshiva Univ., 73 A.D.3d 634 (N.Y. App. Div. 1st Dep't 2010)...16

Puglise v. Regency Nursing, LLC, No. 3:09-CV-457, 2009 U.S. Dist. LEXIS 87566 (W.D. Ky. Sep. 23, 2009) 21

Page(s)

Quintas v Pace Univ., No. 108035/03,
2004 NY Slip Op 30343(U) (N.Y. Sup. Ct. July 12, 2004) 16

Routh v. Univ. of Rochester, 981 F. Supp. 2d 184 (W.D.N.Y. Nov. 5, 2013) 16, 17, 18, 19

Sahm v. Miami Univ., 110 F. Supp. 3d 774 (S.D. Ohio May 20, 2015) 12

Salau v. Denton, 139 F. Supp. 3d 988 (W.D. Mo. Oct. 8, 2015) 12

Scheuer v. Rhodes, 416 U.S. 232 (1974) 7

Smith v. Local 819 Pension Plan, 291 F.3d 236 (2d Cir. 2002) 7

Stapor v. Wagner Coll., 997 N.Y.S.2d 101 (N.Y. Sup. Ct. 2014) 16

Taggart v Costabile, 131 A.D.3d 243 (N.Y. App. Div. 2d Dep't 2015) 23

Ullmo ex rel. Ullmo v. Gilmour Acad., 273 F.3d 671 (6th Cir. 2001) 17, 18

Virgil v. Darlak, No. 10-CV-6479P,
2013 U.S. Dist. LEXIS 110411 (W.D.N.Y. Aug. 6, 2013) 22

Yu v. Vassar College, 97 F. Supp. 3d 448 (S.D.N.Y. 2015) 8, 9, 10, 13, 15, 22

Yusuf v. Vassar Coll., 35 F.3d 709 (2d Cir. 1994) 8, 9, 13

STATUTES

20 U.S.C. § 1681(a) 8

C.P.L.R. § 7800 et. seq. 15, 16

I. INTRODUCTION

After an investigation and a hearing, Hobart and William Smith Colleges ("HWS" or "Defendant") expelled Plaintiff Matthew Rolph in April 2014, finding that it was more likely than not that he violated HWS' Sexual Misconduct Policy by having non-consensual anal sex with another student, Jane Roe. HWS' investigation revealed that Jane immediately informed two friends of the assault. She sent one of the friends a text message while still with Rolph, and sought her assistance to get Rolph out of her apartment. Jane spent the night at another friend's apartment, telling the friend that Rolph had "forced himself" on her. Jane Roe notified both HWS and local law enforcement of the assault shortly after it occurred. The District Attorney filed criminal charges against the Plaintiff for sexually assaulting Jane.

Plaintiff now sues HWS claiming that the real reason HWS disciplined him was not because it believed Jane's account was more likely than his, but rather to discriminate against him because he is a man. He thus sues HWS for violating Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*. Plaintiff's claim should be dismissed because he fails to plead facts raising a plausible inference of gender discrimination and his theory of "motive" is baseless. While Plaintiff claims that HWS wanted to "make an example" of him to defend itself against widespread media reports that resulted after a July 2014 *New York Times* article criticizing HWS' handling of another sexual assault case, the Amended Complaint makes clear that Plaintiff was expelled months ***before*** that article and the resulting publicity occurred. Moreover, the fact that an independent third party (the District Attorney) investigated the matter and came to the same conclusion as HWS – that there was "reasonable cause" to believe Rolph had assaulted Jane – negates any suggestion that HWS' proceedings against Rolph were some sham to hide its gender discrimination.

The purpose of Title IX is to prevent discrimination in educational programs on the basis of sex. Congress did not design Title IX as vehicle to re-litigate internal decisions of private colleges like HWS in federal court. HWS provided Plaintiff with a fair process in compliance with its policies and most certainly did not discriminate against him because of the fact that he is a man. The Amended Complaint fails to plead facts raising a plausible inference suggesting otherwise.

Plaintiff's state law claims fare no better than his Title IX claim. His breach of contract claim (Count Three) should be dismissed because he points to no substantial deviation from HWS' policies and procedures for adjudicating sexual misconduct claims. Instead, he tries to imply other duties that contradict the terms of the policy under the guise of the "covenant of good faith and fair dealing." The law does not permit him to do so. Plaintiff's remaining state law claims for promissory estoppel (Count Four), negligence (Count Five), and negligent infliction of emotional distress (Count Six) should be dismissed because they are not recognized in New York and/or are duplicative of Plaintiff's contract claim, and/or Plaintiff has not set forth sufficient facts to allow these claims to proceed.

The Court should grant HWS' motion and dismiss the Amended Complaint with prejudice.

II. ALLEGATIONS IN THE AMENDED COMPLAINT

A. *Jane Roe Claims That Rolph Sexually Assaulted Her, Immediately Tells Her Friends and Promptly Reports the Assault to the Colleges*

Plaintiff was a student at HWS from September 2010 until his permanent separation in April 2014. Am. Compl. at ¶ 2. On or around February 22, 2014, Plaintiff and the female student who ultimately charged him with sexual assault, Jane Roe, engaged in a physical encounter that led to the disciplinary proceeding at issue in this lawsuit. *Id.* at ¶ 34.

On that night, both students agree that Rolph went to Jane Roe's room, where both students agreed that their encounter began consensually with kissing and vaginal intercourse. *Id.* at ¶¶ 34(b); 38(a), (d)-(e). During the encounter, Jane Roe took a brief call on her cell phone from her friend, J.C. *Id.* at ¶ 34(c)-(d). Jane Roe claimed that after that phone call Plaintiff began to penetrate Jane Roe anally with his penis and hand without her consent. *Id.* at ¶¶ 38(e); 46(e).[1]

According to both Jane Roe and her friend, C.E., while Jane was in the room with Plaintiff she texted C.E. seeking her intervention. *Id.* at ¶¶ 43(g), 45(d). Jane Roe left the room, spoke with C.E., who described Jane as very upset, and C.E. then went back to the room at Jane's request to ask Rolph to leave. *Id.* at ¶ 34(e), 43(g), 45(b). Plaintiff says that he then texted Jane Roe, "go f--- yourself" after he left. *Id.* at ¶ 34(e). Plaintiff and her friend, J.C., confirmed that Jane then immediately went to J.C.'s apartment, told J.C. that Rolph had "forced himself" on her, and spent the night at J.C.'s apartment. *Id.* at ¶ 44(e); ¶ 43(h).

Shortly after telling her friends about the alleged assault, on or about February 25, 2014, Jane Roe reported to HWS that Plaintiff had sexually assaulted her. *Id.* at ¶ 36. On or about February 26, 2014, Jane Roe went to the hospital. *Id.* at ¶ 37. Thus, while the Amended Complaint questions "Jane Roe's motive for coming forward with the rape allegations so long after the incident," *id.* at ¶ 50(c), in fact she immediately reported the incident to her friends and promptly reported it to HWS just days after the incident.[2]

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[1] Jane Roe told the investigator that she told Plaintiff to stop and he simply ignored her requests.

[2] In any event, it is common for sexual assault victims to delay in reporting the assault. Patricia L. Fanflik, National District Attorneys Association, American Prosecutors Research Institute, *Victim Responses to Sexual Assault*, Aug. 2007, at 9, http://www.ndaa.org/pdf/pub_victim_responses_sexual_assault.pdf ("[T]here is research to suggest that women, for various reasons, often delay in reporting sexual victimization. This victim behavior is frequently misconstrued and interpreted as the victim is not being truthful and is lying about the attack.").

B. *A Civil Court Grants a Temporary Order of Protection for Jane Roe and The District Attorney Charges Plaintiff With a Criminal Sex Act*

Jane Roe also promptly reported the assault to civil and criminal authorities. On or about February 28, 2014, Jane Roe provided a sworn statement in a Supporting Deposition for the City Court for the City of Geneva describing the sexual encounter, including that Plaintiff had penetrated her anally without her consent. *Id.* at ¶ 38. The Ontario County Family Court granted Jane Roe a temporary order of protection against Plaintiff, and Plaintiff consented to the Order. *Id.* at ¶ 39. Jane Roe also reported the incident to the police. Based on its investigation, the Ontario County District Attorney's Office found reasonable cause to charge Plaintiff with a criminal sex act. *Id.* at ¶ 40. Although the District Attorney's Office found reasonable cause to charge Plaintiff, the jury ultimately did not find Plaintiff guilty under the criminal standard of "beyond a reasonable doubt."[3] *See id.*

C. *HWS Conducts an Investigation Using an Outside Attorney Who Was Certified in Title IX Investigations*

HWS retained an external investigator, Erin Beatty, Esq. of Harter Secrest Emery, LLP, to conduct an investigation into Jane Roe's report. *Id.* at ¶ 42. Ms. Beatty is a Certified Title IX Investigator from the National Center for Higher Education Risk Management. *Id.* During her investigation, Attorney Beatty interviewed (1) Jane Roe; (2) Plaintiff; the two witnesses who spoke with Jane Roe immediately after the incident, her friends (3) J.C., and (4) C.E.; and (5) M.K., a friend of Plaintiff's whom Plaintiff saw after his encounter with Jane Roe and who Plaintiff identified to Attorney Beatty as a witness. *See id.* at ¶¶ 43-47. Jane Roe reported to Attorney Beatty that Plaintiff anally penetrated her without her consent after she got off the phone. *Id.* at ¶ 43(f). J.C. reported to Attorney Beatty that she saw Jane Roe shortly after her sexual encounter with Plaintiff, and that Jane Roe was upset and stated that Plaintiff had

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[3] The criminal proceedings concluded several months after HWS' proceedings.

"forced himself" onto her. *Id.* at ¶ 44(e). C.E. reported to Attorney Beatty that she too saw Jane Roe right after her encounter with Plaintiff, and that Jane Roe was upset and asked C.E. to tell Plaintiff to leave her room. *Id.* at ¶ 45(e).

During his interview, Plaintiff first told Attorney Beatty "that he did not consciously anally penetrate Jane Roe." *Id.* at ¶ 46(e). He later changed his response and denied that he had ever had anal sex with Jane Roe. *Id.* M.K., Plaintiff's friend whom Plaintiff identified to Attorney Beatty as a witness, reported to Attorney Beatty that Plaintiff contacted him at approximately 2:00 a.m. after the incident asking to come over, and slept in M.K.'s room. *Id.* at ¶ 47(c).

Plaintiff does not plead that Attorney Beatty failed to interview anyone he identified as a witness or that she failed to consider any of the evidence that he offered. While Plaintiff complains that Attorney Beatty did not independently interview certain school officials and friends with whom Jane Roe spoke after the incident (*id.* at ¶¶ 43(i)-(m)), none of the witnesses had any first-hand knowledge of the night in question and the Amended Complaint does not plead what light these witnesses supposedly would have shed on the events in question.[4] And, while Plaintiff further claims that Attorney Beatty failed to forensically examine cell phones and ensure preservation of electronically stored information (*id.* at ¶¶ 43(d), 44(f), 45(g)), he fails to acknowledge that institutions of higher education lack subpoena power, nor does he allege (even with the benefit of all the discovery he obtained in his criminal trial) how any such evidence would have affected the ultimate outcome of the hearing, where there was no apparent dispute as to what text messages were sent.

[4] While Plaintiff on the one hand claims that Attorney Beatty should have interviewed every person with whom Jane Roe spoke after the incident, he simultaneously criticizes Attorney Beatty for asking Jane Roe too many questions about "events that happened in the days following the assaults." Am. Compl. at ¶ 43(b).

D. *A Sexual Grievance Panel Finds Plaintiff Responsible for Non-Consensual Sexual Contact and Permanently Dismisses Him from HWS*

On April 14, 2014, after receiving Attorney Beatty's investigation report, HWS convened a Sexual Grievance Panel (SGP) to adjudicate whether Plaintiff violated the Sexual Misconduct Policy by engaging in non-consensual sexual conduct with Jane Roe. *Id.* at ¶ 51. Pursuant to HWS' policy, neither party was permitted an attorney, but both parties had an advisor. *Id.* at ¶ 51(c). Both Jane Roe and Rolph provided a statement to the SGP. *Id.* at ¶ 51(d), (e). The SGP concluded that Rolph violated the Sexual Misconduct Policy and recommended that he be expelled. *Id.* at ¶ 52. On April 15, 2014, HWS provided written notice to Plaintiff that he was "permanently separated" from HWS. *Id.* at ¶ 53. The letter advised Plaintiff that the SGP had determined it was "more likely than not" that he had committed the offense alleged. *Id.* at ¶ 53(b).

On April 16, 2014, Plaintiff advised HWS that he would appeal the SGP's decision and requested additional time to prepare his appeal. *Id.* at ¶ 54(a). HWS granted Plaintiff an extension of time until April 28, 2014. *Id.* at ¶ 54(a). To prepare his appeal, Plaintiff was permitted to listen to an audio recording of the hearing. *Id.* at ¶ 54(b). Plaintiff submitted his appeal on April 28, 2014. *Id.* at ¶ 55. Plaintiff's appeal was denied on May 1, 2014. *Id.* at ¶ 57.

E. *Public Discussion Concerning HWS' Handling of Other Sexual Assault Cases Does Not Occur Until After Rolph is Expelled*

Plaintiff posits gender discrimination on the notion that HWS was motivated to "make an example" of him after it received negative publicity from a *New York Times* article that criticized HWS' handling of a sexual assault case involving a student named "Anna." *See, e.g.*, Am. Compl. at ¶ 60. But as the Amended Complaint itself makes clear, this *New York Times* article did not appear until over two months ***after*** Rolph was expelled. *See id.* at ¶ 13(b).

Indeed, except for a single "blog" entry made by a parent in February 2014, ***all*** of the publicity and public discussion Plaintiff identifies in the Amended Complaint concerning this incident and supposed "scrutiny" of HWS occurred well after Rolph's case was concluded. *See id.* at ¶¶ 13-15. There was no gender discrimination, and the Amended Complaint fails to plead facts plausibly suggesting otherwise.

* * *

Over two years after his expulsion and over one year after his criminal trial was completed, Plaintiff filed this lawsuit claiming that HWS' decision to expel him was motivated by his status as a male. As shown below, the Amended Complaint does not raise any plausible inference of discrimination. Nor can he show any violation of New York law. The Amended Complaint should be dismissed.

III. ARGUMENT

A. *Standard on Motion to Dismiss*

A Rule 12(b)(6) motion to dismiss examines the sufficiency of the complaint. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The plausibility standard . . . asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557)). While the Court must accept material allegations in the complaint as true, the court need not accept conclusory allegations or legal conclusions masquerading as factual conclusions. *See Smith v. Local 819 Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002); *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir. 1995).

B. *Plaintiff Fails to State a Plausible Claim of Gender Discrimination Under Title IX*

Title IX prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance. 20 U.S.C. § 1681(a). Although the statute is silent as to civil damage remedies, the United States Supreme Court has held that Title IX allows an ***implied*** right of action for money damages. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) (emphasis added). But the Supreme Court has made clear that because Title IX was passed pursuant to Congress' spending power, the private right of action is a narrow one, available only "where the funding recipient engages in intentional conduct that violates the clear terms of the statute." *Davis v. Monroe Cty. Bd. of Education*, 526 U.S. 629, 641 (1999); *see Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 283 (1998).

While Title IX provides a remedy where a school disciplines a student because of its intentional gender discrimination, *see Doe v. Columbia University*, No. 15-1536, 2016 U.S. App. LEXIS 13773 (2d Cir. July 29, 2016), *petition for reh'g pending*, Title IX does not create a federal cause of action to challenge the internal disciplinary actions of private institutions. The Court's role is "neither to advocate for best practices nor to retry disciplinary proceedings." *Yu v. Vassar College*, 97 F. Supp. 3d 448, 461 (S.D.N.Y. 2015). Rather, the sole question under Title IX is whether when HWS "expelled [Plaintiff] for sexually assaulting a fellow student, it discriminated against him based on his gender in violation of Title IX . . . ." *Id.*

In *Yusuf v. Vassar Coll.*, 35 F.3d 709 (2d Cir. 1994), the Second Circuit categorized Title IX claims against universities arising from disciplinary hearings into two types: "erroneous outcome" claims where "the plaintiff was innocent and wrongly found to have committed an offense," and "selective enforcement" claims, where regardless of the plaintiff's guilt or innocence, "the severity of the penalty was affected by the student's gender." *Yusuf*, 35 F.3d at 715.

Here, Plaintiff appears to bring an erroneous outcome claim. *See* Am. Compl. at ¶ 68 ("The decisions of the SGP and the appeal process were erroneous outcomes which were the direct result of a flawed and biased proceeding.") "Plaintiffs who claim that an erroneous outcome was reached must allege ***particular facts*** sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding" and "***particular circumstances*** suggesting gender bias was a motivating factor behind the erroneous finding." *Yusuf*, 35 F.3d at 715 (emphasis added). Examples of such facts may include "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender." *Id.*; *see Yu*, 97 F. Supp. 3d at 475 (same). Mere "allegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss." *Yusuf*, 35 F.3d at 715.

Plaintiff identifies no overt evidence of gender discrimination in the Amended Complaint. Instead, Plaintiff asks the Court to infer gender discrimination because HWS was supposedly motivated to "make an example of . . . Rolph" to placate public opinion and pressure from the federal government in response to a *New York Times* article concerning HWS' handling of a different case. Am. Compl. at ¶ 60. Plaintiff will likely rely on the Second Circuit's recent decision in *Doe v. Columbia Univ*., No. 15-1536, 2016 U.S. App. LEXIS 13773 (2d Cir. July 29, 2016), in which the Court allowed a complaint to proceed based on allegations that Columbia disciplined a student "to refute criticisms circulating in the student body and the public press that

Columbia was turning a blind eye to female students' charges of sexual assault by male students." *Id.*, at *24-25. The Second Circuit found that such allegations, coupled with the school's "failure to seek out potential witnesses Plaintiff had identified as sources of information favorable to him," were sufficient to create a "minimal inference of bias," which survived a motion to dismiss.[5] *Id.*

Unlike the plaintiff in the *Columbia* case, however, Rolph fails to point to "criticisms circulating in the student body and public press" about HWS' handling of sexual assault that existed at the time of his proceedings which could have influenced those responsible for conducting the proceedings. Instead, Plaintiff points to a *New York Times* article that appeared two months ***after*** he was expelled and the discussions that followed the *New York*

[5] While HWS recognizes that this Court is bound by the Second Circuit's decision in *Columbia*, and while the case is distinguishable for the reasons set out above, HWS respectfully submits that the case was wrongly decided. A petition for Rehearing or Rehearing En Banc is presently pending, a copy of which is attached hereto as Exhibit A. As explained in that petition, the Second Circuit's decision misapplied the Supreme Court's pleading standards as set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Furthermore, the Second Circuit imported the *McDonnell-Douglas* burden-shifting framework applicable in Title VII claims without considering the differences between Title VII and Title IX. Unlike Title VII, Title IX provides only an ***implied*** right of action for cases involving ***intentional*** discrimination on the basis of sex. *See Franklin v. Gwinnett County Pub. Sch*., 503 U.S. 60, 76 (1992); *Davis v. Monroe Cty. Bd. of Education*, 526 U.S. 629, 641 (1999); *see also Yu v. Vassar Coll.,* 97 F. Supp. 3d 448, 461 n.6 (S.D.N.Y. 2015) ("Title IX also reaches only intentional discrimination"). The Supreme Court of the United States in *Gebser* explained in great detail that there are significant differences between the two statutes – including the fact that Title IX is an ***implied*** cause of action and the statute is an exercise of Congress' ***spending power*** which requires clear notice to recipients of what conduct is prohibited – meaning that standards applied in Title VII claims should not automatically be imported into Title IX claims. *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 280-92 (1998). The Second Circuit in *Columbia* did not discuss *Gebser* at all, other than to cite it in passing. And, while the Second Circuit suggested that it is plausible to infer that schools under public and/or government scrutiny about their handling of cases will rig their disciplinary proceedings against male respondents, HWS respectfully submits that such an inference is not at all plausible. As the Amended Complaint itself illustrates, schools have received scrutiny and been subject to civil complaints and government investigations from both Complainants and Respondents, both men and women. In an environment where every sexual misconduct hearing carriers with it the high risk that the side that does not obtain the result it desires will file suit or complain to OCR, it would be fundamentally ***im***plausible that schools would "rig" their proceedings in favor of one side or the other, rather than seek to provide as fair and balanced a process as possible. At least one district court has already declined to adopt the Second Circuit's reasoning in *Doe v. Columbia*, finding "there remains no plausible inference that a university's aggressive response to allegations of sexual misconduct is evidence of gender discrimination." *Austin v. Univ. of Or.*, No. 6:15-CV-02257-MC, 2016 U.S. Dist. LEXIS 121198, at *28-30 (D. Or. Sept. 8, 2016) The district court in *Austin* aptly observed that "accept[ing] the Second Circuit's pleading standard would put universities in a double bind. Either they come under public fire for not responding to allegations of sexual assault aggressively enough or they open themselves to Title IX claims simply by enforcing rules against alleged perpetrators." *Id.*

Times article months ***after*** he was expelled. Moreover, unlike the *Columbia* case where the plaintiff pleaded that the investigator simply refused to follow up on information that he had affirmatively asked her to investigate, Rolph does not (and cannot) plead that the investigator or the Panel refused to consider every witness and every piece of evidence he asked them to consider.

Furthermore, any "minimal" inference of gender discrimination is belied by the fact that Plaintiff here was ***criminally charged*** with a sex crime. Thus, the District Attorney's Office, after conducting its own investigation and analysis, made the independent decision to proceed with charges by finding there was "reasonable cause" to do so.[6] The Amended Complaint does not plead (nor could it plead) that the District Attorney's Office was motivated by gender bias or was somehow conspiring with HWS to "make an example" of Rolph. That an independent third party reached the same conclusion as HWS fully negates any inference – minimal or not – that HWS reached an erroneous outcome in the case for the purpose of discriminating against the Plaintiff based on his gender.

At bottom, Plaintiff's Amended Complaint is based on precisely the type of conclusory allegations that courts have regularly found insufficient to survive a motion to dismiss.[7] *See, e.g., Doe v. Univ. of Cincinnati*, No. 1:15-CV-681, 2016 U.S. Dist. LEXIS 37924, at *29 (S.D. Ohio Mar. 23, 2016) ("[A]t worst UC's actions were biased in favor of alleged victims of sexual assault and against students accused of sexual assault. However, this is not the same as gender bias because sexual assault victims can be either male or female."); *Salau v. Denton*, 139 F. Supp. 3d 988, 999 (W.D. Mo. Oct. 8, 2015) ("Even if the University treated the female student more favorably than the Plaintiff, during the disciplinary process, the mere fact that Plaintiff is male and [the alleged victim] is female does not suggest that the disparate treatment was because of Plaintiff's sex." (internal quotation marks and citation omitted); *Ludlow v. Northwestern Univ.*, 125 F. Supp. 3d 783, 792 (N.D. Ill. 2015) (plaintiff's allegations that procedures were biased in favor of the victim and that he was denied fair procedures "because he is male ... is the kind of conclusory statement that courts reject as insufficient to plead this claim"); *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Ohio May 20, 2015) ("[D]emonstrating that a university official is biased in favor of the alleged victims of sexual assault claims, and against the alleged perpetrators, is not the equivalent of demonstrating bias against male students." (citing cases)).

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[6] Plaintiff also seeks to undermine HWS' finding against him by pointing out that he was ultimately acquitted of the criminal charges against him. *See* Am. Compl. at ¶ 40. But the criminal process uses a standard of "beyond a reasonable doubt," whereas HWS' disciplinary process, as Plaintiff acknowledges, uses a lower preponderance of the evidence standard as required by the United States Department of Education. *See* Am. Compl. at ¶ 10(b) and at Ex. A at 18. The Sexual Misconduct Policy clearly states: "The Colleges have the right to take action regarding any conduct prohibited by this policy . . . regardless of whether it violates the law and regardless of any action being pursued by the authorities." Am. Compl. at Ex. A at 13.

[7] *See, e.g.,* Am. Compl. at ¶ 67 ("The Colleges committed impermissible gender bias against Rolph in the investigation and adjudication of Jane Roe's accusations); ¶ 68(a) ("The Colleges . . . assumed that Rolph was guilty because he was a male accused of sexual assault rather than evaluating the case on its own merits"); ¶ 69(g) ("The panel's consideration of Jane Roe incapacitation in reaching the finding of Rolph's responsibility is consistent with a view of men as predators and women as 'guardians of virtue.'").

In a similar recent case, *Doe v. Regents of the Univ. of Cal.*, No. 2:15-cv-02478-SVW-JEM, 2016 U.S. Dist. LEXIS 123612 (C.D. Cal. July 25, 2016), the plaintiff brought Title IX claims based on both erroneous outcome and selective enforcement theories. The plaintiff alleged that male students at the university were treated and sanctioned less favorably than female students accused of sexual misconduct, due to the fact that sexual assaults are predominantly committed by men against women. *Id.*, at *8. Plaintiff also claimed the university was biased against male students "[i]n light of the national and local pressure to combat sexual assault on campuses." *Id.*, at *8-9. Plaintiff asserted that backdrop gave rise to an inaccurate and biased investigative report against him, and a disciplinary committee that credited his accuser's version of events against contradicting testimony from the plaintiff and other eyewitnesses – all because plaintiff was male. *Id.*, at *13.

The *Regents* court concluded that plaintiff's allegations were insufficient to state a Title IX claim under either theory, finding "the Court cannot plausibly infer, as Plaintiff does, that a higher rate of sexual assaults committed by men against women, or filed by women against men, indicates discriminatory treatment of males accused of sexual assault in the consequent proceedings." *Id.*, at *14-15. Nor did plaintiff allege any facts showing the individuals involved in his case demonstrated gender bias against males. *Id.*, at *14. Accordingly, the plaintiff's claim was dismissed.

Rolph also alleges a series of supposed procedural defects as evidence of gender bias during his disciplinary process. But procedural errors alone do not suggest gender discrimination. *See Yusuf*, 35 F.3d at 715 ("[A]llegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss."). Moreover, none of the alleged "errors" has merit:

- Plaintiff argues that HWS' sexual misconduct policies and procedures inherently favor sexual assault complainants, and that "women rarely, if ever, are accused of sexual harassment by the Colleges." Am. Compl. at ¶ 68(a)-(b). But, as just shown, the mere fact that men are more likely to be charged with sexual harassment or assault than women does not mean that HWS' policies are biased in favor of women. *Regents*, 2016 U.S. Dist. LEXIS 123612 at *14; *Yu*, 97 F. Supp. 3d at 479 n.26.

- Plaintiff also argues that respondents at HWS are denied the opportunity to present evidence in their defense. Am. Compl. at ¶ 69(c). Not so. The Sexual Misconduct Policy states that the hearing panel will meet with both parties and that each party is permitted to provide a list of relevant witnesses. Am. Compl. at Ex. A at 17. In his own case, Plaintiff alleges that both he and a witness he identified were interviewed by the investigator, he provided a written statement to the panel, and he submitted a written appeal. *Id.* at ¶¶ 46-47, 51(e), 55. He does not identify any witnesses or evidence he offered at the time of the investigation that were not considered.

- Plaintiff alleges that respondents are denied a full and fair hearing because they are denied the presence of counsel at meetings and during the hearing. Am. Compl. at ¶ 69(b)-(e). The policy, however, applied equally – neither the complainant nor the respondent were entitled to an attorney during the hearing. Plaintiff also has no right to legal counsel during school disciplinary proceedings and it was common practice at the time not to allow attorney participation in such proceedings. *Johnson v. Temple Univ.*, No. 12-515, 2013 U.S. Dist. LEXIS 134640, at *26 (E.D. Pa. Sept. 19, 2013) (noting that, even in public school cases where due process applies, "[t]he general consensus on a student's right to an attorney is that 'at most the student has a right to get the advice of a lawyer; the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel, as by examining and cross-examining witnesses and addressing the tribunal.'" (citing *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993)).

- Plaintiff also alleges that respondents are denied the opportunity to cross-examine their accusers. Am. Compl. at ¶ 69(c). Again, the policy provided that neither party could cross examine the other and was gender neutral. Moreover, the U.S. Department of Education has rejected Plaintiff's contention that he had a right to confront Jane Roe at the hearing. *See* Exhibit B, U.S. Department of Education April 4, 2011 "Dear Colleague Letter" at 12 (stating that Department "strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing"). Nor is there an established right even in public schools where (unlike HWS) rules of due process apply to cross-examine parties; most colleges do not offer the right to cross-examine witnesses, or only allow parties to field questions through a mediator. *See, e.g., Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005) (finding no due process violation where student at medical college was able to listen to and observe officer's testimony at disciplinary hearing and had the opportunity to present his version of events); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) ("[S]uffice it to state that the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases.").

- Plaintiff attempts to undermine the investigation and the panel's decision by questioning Jane Roe's credibility. However, "[t]he Court is not tasked with weighing Plaintiff's account of the alleged sexual assault against Jane Doe's account of the event . . . The Court's task is simply to determine whether Plaintiff has alleged sufficient non-conclusory allegations to plausibly infer that he was discriminated against because of his sex." *Doe v. Regents of the Univ. of Cal.*, 2016 U.S. Dist. LEXIS 123612, at *9-10;

> *see Yu*, 97 F. Supp. 3d at 461. In fact, Jane Roe provided consistent accounts to law enforcement and HWS that what began as consensual vaginal intercourse with Plaintiff turned into non-consensual anal sex.[8] Nor was there any "delay" in Jane Roe's reporting of the incident. Am. Compl. at ¶¶ 43(n), 50(c). She told at least two of her friends, J.C. and C.E., what happened immediately after the incident (*see id.* at ¶¶ 43(g), 44(e), 45(e)-(f)), and she reported it to HWS on February 25, just three days later, *id.* at ¶ 36.

In sum, Plaintiff alleges no facts supporting a plausible inference that his gender had anything to do with the investigation or adjudication of Jane Roe's case against him. To the contrary, the fact that an independent law enforcement agency came to the conclusion that there was sufficient evidence to criminally charge Plaintiff undermines any notion that HWS' actions were based on gender bias. Plaintiff's Title IX claim should be dismissed.

C. *Plaintiff's State Law Claims Challenging His Expulsion Should Have Been Brought as an Article 78 Proceeding and are Time-Barred*

To the extent Plaintiff's state law claims challenge his expulsion, such claims should have been brought as an Article 78 proceeding within four months of when the challenged decision became final. *See* N.Y. C.P.L.R. § 7800 *et. seq.*; *see, e.g., Ansari v. New York Univ.*, No. 96 Civ. 5280 (MBM), 1997 U.S. Dist. LEXIS 6863, at *7 (S.D.N.Y. May 12, 1997) (finding review of academic and administrative decisions at private educational institutions, including expulsions and suspensions, has been limited to Article 78 proceedings); *Miyahara v. Majsak*, 117 A.D.3d 812, 813 (N.Y. App. Div. 2d Dep't 2014) (portion of plaintiff's breach of contract claim predicated upon allegations that he was improperly dismissed from college's doctorate program should have been brought as an Article 78 proceeding within four months after determination became final and binding); *Kickertz v. New York Univ.*, 110 A.D.3d 268, 274 (N.Y. App. Div. 1st Dep't 2013) ("[T]o the extent plaintiff's breach of contract claim

[8] Plaintiff questions Jane Roe's level of intoxication on the night in question. *See* Am. Compl. at ¶¶ 46(c), 69(g)-(h). Whether Jane Roe was intoxicated or not, she did not consent to anal sex.

challenges NYU's decision to expel her based on a violation of its disciplinary rules and seeks specific performance in the form of an award of a DDS degree, it is 'not cognizable in a breach of contract action'") (internal citation omitted); *Padiyar v. Albert Einstein Coll. of Medicine of Yeshiva Univ*., 73 A.D.3d 634, 635 (N.Y. App. Div. 1st Dep't 2010) ("The instant plenary complaint, while couched in terms of unlawful discrimination and breach of contract, is in fact a challenge to a university's academic and administrative decisions and thus is barred by the four-month statute of limitations for a CPLR article 78 proceeding, the appropriate vehicle for such a challenge."); *Quintas v Pace Univ.,* No. 108035/03, 2004 NY Slip Op 30343(U), at *7 (N.Y. Sup. Ct. July 12, 2004) (dismissing plaintiff's breach of contract and negligence claims as untimely under Article 78 statute of limitations); *Mitchell v New York Univ*., No. 150622/2013, 2014 N.Y. Misc. LEXIS 105, at *20-21 (N.Y. Sup. Ct. Jan. 8, 2014) (dismissing negligence claim challenging university's determination to exclude plaintiff from campus as "seek[ing] relief in the nature of an Article 78 proceeding" and untimely). *Accord Stapor v. Wagner Coll.*, 997 N.Y.S.2d 101 (N.Y. Sup. Ct. 2014) (student suspended for violating sexual misconduct policy brought Article 78 proceeding). Plaintiff's claims are time barred because he filed suit on July 26, 2016 – more than two years after his expulsion became final on May 1, 2014, when his appeal was denied by HWS. *See* Am. Compl. at ¶ 57. The Court should therefore dismiss Plaintiff's state law claims premised on his expulsion as untimely.

D. *Plaintiff Fails to State a Plausible Claim for Breach of Contract*

New York law does not permit courts to review disciplinary or other internal decisions made by a private college except in limited circumstances. "When a disciplinary dispute arises between the student and the university, judicial review of the institution's actions is limited 'to whether the [institution] acted arbitrarily or whether it ***substantially complied*** with its own rules and regulations." *Routh v. Univ. of Rochester*, 981 F. Supp. 2d 184, 208

(W.D.N.Y. Nov. 5, 2013) (emphasis added) (quoting *Jones v. Trustees of Union College*, 92 A.D.3d 997, 998-99 (N.Y. App. Div. 3d Dep't 2012)); *Faiaz v. Colgate Univ.*, 64 F. Supp. 3d 336, 358 (N.D.N.Y 2014) (same); *Fraad-Wolff v. Vassar College*, 932 F. Supp. 88, 91 (S.D.N.Y. 1996) ("[W]hatever the legal theory underlying plaintiff's claim may be, the crucial issue is whether defendant conducted the disciplinary proceedings against plaintiff substantially in accordance with its established procedures").

Further, a plaintiff must identify the specific terms of the contract that he claims were violated by the institution. *Routh*, 981 F. Supp. 2d at 208. "[T]he mere allegation of mistreatment without the identification of a specific breached promise or obligation does not state a claim upon which relief can be granted." *Gally v. Columbia Univ.*, 22 F. Supp. 2d 199, 207 (S.D.N.Y. 1998). "Language in a college handbook or other official statement that is merely aspirational in nature, or that articulates a general statement of a school's 'ideals,' 'goals,' or 'mission,' is not enforceable." *Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 709 (D. Vt. 2012); *see Ullmo ex rel. Ullmo v. Gilmour Acad.*, 273 F.3d 671, 676-77 (6th Cir. 2001) (holding "a breach of contract claim will not arise from the failure to fulfill a statement of goals or ideals"); *Gally*, 22 F. Supp. 2d at 207-208 (observing that "a general statement of adherence . . . to existing anti-discrimination laws" and "general promises about ethical standards" are unenforceable).

The gist of Rolph's contract claim is not that HWS failed to follow the policies that it actually had in place, but that by following its policies it breached "an implied covenant of good faith and fair dealing" and "the explicit guarantee of essential fairness." *See* Am. Compl. at ¶¶ 15, 81-82, 84 and Ex. A (Student Handbook). His claim falls short for several reasons. "Under ample New York precedent, a student cannot maintain a breach of contract claim against a university based solely on the implied covenant of 'good faith[.]'" *Evans v. Columbia Univ.*, No. 14-cv-2658 (NSR), 2015 U.S. Dist. LEXIS 48768, at *10-11 (S.D.N.Y. Apr. 13, 2015) (citing cases). Nor do HWS' procedures provide an "explicit guarantee of essential fairness," as Plaintiff claims. At most, Plaintiff cites to various aspirational statements in the Student Handbook (*see* Am. Compl. at ¶ 15(a) (regarding the Colleges' commitment to creating and maintaining an academic environment of respect and trust); ¶ 15(b) (stating that the Sexual Misconduct Policy is "intended to reflect the interests of the [Colleges] community and . . . federal and state laws")), which are not enforceable in a breach of contract claim. *Knelman*, 898 F. Supp. 2d at 709; *Ullmo*, 273 F.3d at 676-77; *Gally*, 22 F. Supp. 2d at 207-208.

In a similar case, *Routh v. Univ. of Rochester*, a court in this District granted a motion to dismiss where a male student who engaged in bondage-style sexual activities with a female student (which he alleged were consensual) was found guilty of rape and strangulation, and ultimately expelled. He alleged the disciplinary hearing panel impermissibly deviated from university procedures and was therefore liable for breach of contract. *See Routh,* 981 F. Supp. 2d at 207. The court explained that "the issue as to this cause of action is whether Routh has plausibly pleaded that, with regard to the notice that the University gave him regarding his disciplinary charges, the University acted arbitrarily or failed to ***substantially comply*** with its own rules and regulations." *Id*. at 208 (emphasis added). Like Plaintiff here, Routh sought to argue that outside influence – in Routh's case, a general comment from an administrator "that the university could definitely improve how it wrote its disciplinary charges" – affected the disciplinary panel's decision. The court rejected this argument, and focused on Routh's hearing alone, holding that "the pleading and other documents which the Court is considering on this motion clearly indicate that Routh was given reasonably specific notice of the charges against him." *Id*. at 209.

Plaintiff here fails to identify any substantial deviation from HWS' policies and procedures.

- First, Plaintiff alleges "[t]he Colleges breached the implied obligation to perform a threshold evaluation of the allegations before starting an investigation." (Am. Compl. at ¶ 84(a)). The Sexual Misconduct Policy imposes no such obligation. Rather, the Policy notes that "[b]ecause of the nature of discrimination (including allegations of sexual and other forms of harassment), such allegations often cannot be substantiated by direct evidence other than the complainant's own statement." Am. Compl. at Ex. A at 14. Thus, there was no deviation.

- Second, Plaintiff alleges that HWS failed to provide a full and fair investigation because "the College's investigator, Beatty, did not conduct any investigative activity until April 7, 2014," and "had no real-world experience in, or training about, investigations into allegations [of] sexual assault" (Am. Compl. at ¶ 84(b)). Nothing in the policy states when interviews must begin, nor does the Sexual Misconduct Policy make specific promises regarding investigator qualifications. In any event, Plaintiff concedes that Attorney Beatty is a licensed attorney with experience investigating discrimination and harassment claims, and is a certified Title IX investigator. Am. Compl. at ¶ 42. Whether that certification includes law enforcement investigation training for sexual assault cases is irrelevant – this investigation concerned a violation of college policy, not a criminal investigation.

- Third, Plaintiff alleges that HWS failed to provide an unbiased hearing panel because HWS administrators "'believed' the Complainant without conducting any investigation and "Rolph was prohibited from confronting his accuser" (Am. Compl. at ¶ 84(c)-(d)). That the panel credited Jane Roe's account of the incident over Plaintiff's account does not mean the panel was biased; Plaintiff simply was not found to be as credible. And, HWS policy specifically prohibits cross-examination (*see* Am. Compl. at Ex. A at 7) – following policy cannot be a breach of the policy.

- Fourth, Plaintiff alleges that "[t]he Colleges breached its express and implied obligations when it did not permit Rolph to be represented by Counsel," and challenges the Student Handbook provision denying attorneys to be present as "inconsistent with the implied guarantees of fundamental fairness" (Am. Compl. at ¶ 84(e)). Again, the Sexual Misconduct Policy does not allow ***any*** parties or witnesses to be represented by counsel before the panel and HWS could not have breached the policy by following it. Am. Compl. at Ex. A at 17 ("Legal counsel for students may not be present for any part of the Panel's meetings with the parties or witnesses.").

- Fifth, and finally, Plaintiff alleges that HWS wrongly found him responsible without sufficient evidence, on the grounds that the Student Handbook allows a finding of responsibility "by the preponderance of the evidence," there was "no physical evidence or witness to support the allegations that Rolph was guilty," and "the only witness presented against Rolph was Jane Roe, who was not a witness a reasonably prudent fact-finder would rely upon." (Am. Compl. at ¶ 84(f)). Plaintiff's allegations do nothing more than second-guess the panel's assessments of evidence and credibility during the hearing. Plaintiff admits that HWS used the exact standard that the Policy says it would use – preponderance of evidence. That Plaintiff disagrees with how the Panel evaluated the evidence does not create a claim for breach of contract.

Thus, Plaintiff fails to state a plausible breach of contract claim. He identifies no specific, enforceable promises that were breached and cannot point to any substantial deviations from HWS' policies and procedures. The Court should dismiss Plaintiff's contract claim.

E. *Plaintiff Fails to State a Plausible Claim for Promissory Estoppel*

Plaintiff's claim for promissory estoppel fails because Plaintiff's promissory estoppel count specifically refers to the "[t]he Student Handbook and other official Colleges publications" as the basis for his claim. *See* Am. Compl. at ¶ 87. An action for promissory estoppel is not cognizable where, as here, there is a binding contract between the parties. *See Kant v. Columbia Univ.*, No. 08 Civ. 7476 (PGG), 2010 U.S. Dist. LEXIS 21900, at *12 (S.D.N.Y. Mar. 9, 2010) ("Where an enforceable contract exists, the doctrine of promissory estoppel is inapplicable and a plaintiff cannot recover under this theory."); *Ferrari v. Keybank N.A.*, No. 06-cv-6525, 2009 U.S. Dist. LEXIS 160, at *31-32 (W.D.N.Y. Jan. 5, 2009) ("The doctrine of promissory estoppel is a 'narrow doctrine' which generally applies only where there is no written contract, or where the parties' written contract is unenforceable for some reason.").

In addition, New York law requires "a clear and unambiguous promise" as an element of a promissory estoppel claim. *See Cyberchron Corp. v. Calldata Sys. Dev.*, 47 F.3d 39, 44 (2d Cir. 1995). Plaintiff vaguely alleges that he relied upon "promises and representations" made by HWS, "including the guarantees of fundamental fairness, and the implied covenant of good faith and fair dealing," without any specific details. Am. Compl. at ¶¶ 87-90. Other courts have dismissed promissory estoppel claims based on such vague and sweeping allegations of promises not to discriminate. *See, e.g., Puglise v. Regency Nursing, LLC,* No. 3:09-CV-457, 2009 U.S. Dist. LEXIS 87566, at *4 (W.D. Ky. Sep. 23, 2009) (dismissing promissory estoppel claim alleging reliance on defendant's "policy against racial discrimination and retaliation"); *Ezold v. WellPoint, Inc.*, No. 3:06CV00381 (AWT), 2007 U.S. Dist. LEXIS 33159, at *13-14 (D. Conn. Apr. 28, 2007) (dismissing promissory estoppel claim premised on defendant's anti-discrimination policy in its employee handbook, noting that such policies "are at the most statements of intention or an articulation of company goals and objectives, and cannot give rise to liability under a theory of promissory estoppel").

Finally, because Plaintiff's allegations are insufficient to state his discrimination claim, they also fail to sufficiently allege that HWS failed to honor a promise not to discriminate. *Downs v. Bel Brands USA, Inc.*, No. 4:14-CV-00016-JHM, 2014 U.S. Dist. LEXIS 118066, at *11-12 n.1 (W.D. Ky. Aug. 25, 2014).

F. ***Plaintiff Fails to State a Plausible Claim for Negligence***

Plaintiff's negligence claim essentially duplicates his breach of contract claim arising out of HWS' policies. *See* Am. Compl. at ¶ 93(a) (alleging HWS breached a duty "imposed by the contractual and/or quasi-contractual relationship between the parties" to conduct a student disciplinary process "in a non-negligent manner and with due care"). Under New York law, however, there is no cause of action for "negligence" in how a school handles a disciplinary hearing. *Yu*, 2015 U.S. Dist. LEXIS 43253 at *97 (dismissing negligence claim by student disciplined for sexual misconduct because New York law does not recognize such a claim.)

Moreover, "the duty giving rise to a gross negligence claim must be independent of the duty arising from a contract. That is, a party cannot sustain a tort claim if it 'does no more than assert violations of a duty which is identical to and indivisible from the contract obligations which have allegedly been breached.'" *Fillmore East BS Fin. Subsidiary LLC v. Capmark Bank*, No. 11 Civ. 4491 (PGG), 2013 U.S. Dist. LEXIS 47608, at *49-50 (S.D.N.Y. Mar. 30, 2013); *see Bayerische Landesbank, N.Y. Branch v. Aladdin Capital Mgmt. LLC*, 692 F.3d 42, 58 (2d Cir. 2012) (holding gross negligence claim must be dismissed as duplicative of a breach of contract claim "unless a legal duty independent of the contract itself has been violated").

G. *Plaintiff Fails to State a Plausible Claim for Negligent Infliction of Emotional Distress*

The same reasons above bar Plaintiff's negligent infliction of emotional distress (NIED) claim, as the cause of action represents another attempt to recover in tort for an action that stems from a contract. "A claim for negligent infliction of emotional distress cannot be asserted if it is essentially duplicative of tort or contract causes of action." *Virgil v. Darlak*, No. 10-CV-6479P, 2013 U.S. Dist. LEXIS 110411, at *27 (W.D.N.Y. Aug. 6, 2013) (internal quotation marks and citations omitted); *see also Gouda v. Harcum Junior Coll.*, No. 14-5456, 2015 U.S. Dist. LEXIS 72562, at *12-13 (E.D. Pa. June 4, 2015) (dismissing NIED claim based on student's dismissal from program because her "right to complain of violations of [the college's] internal grievance and disciplinary procedures stems from her contractual relationship with [the college].").

Plaintiff's NIED claim fails for the additional reason that he has not alleged facts establishing the required elements of the claim. A claim of NIED under New York law requires "[a] breach of the duty of care resulting directly in emotional harm . . . when the mental injury is a direct, rather than a consequential, result of the breach and when the claim possesses some guarantee of genuineness." *Taggart v Costabile*, 131 A.D.3d 243, 253 (N.Y. App. Div. 2d Dep't 2015) (citing *Ornstein v. New York City Health & Hosps. Corp.*, 10 N.Y.3d 1 (N.Y. 2008)). "[T]he guarantee of genuineness generally requires that the breach of the duty owed directly to the injured party must have at least endangered the plaintiff's physical safety or caused the plaintiff to fear for his or her own physical safety[.]" *Id.* (internal quotation marks and citations omitted).[9]

Here, Plaintiff alleges no facts that plausibly suggest HWS' alleged conduct endangered his physical safety or caused him to fear for his physical safety. Accordingly, Plaintiff's NIED claim should be dismissed. *See De Sesto v. Slaine*, No. 15-cv-1118 (AJN), 2016 U.S. Dist. LEXIS 35312, at *18-19 (S.D.N.Y. Mar. 18, 2016) (dismissing NIED claim absent allegations of harm to physical safety or fear thereof).

[9] Although the "guarantee of genuineness" element also can be satisfied by showing a particular kind of negligence recognized by the courts, that recognition has been limited to cases such as the mishandling of a corpse or transmitting false information that a loved one has died. *Taggart v Costabile*, 131 A.D.3d 243, 253 (N.Y. App. Div. 2d Dep't 2015). Plaintiff here has not alleged any such negligent behavior recognized by New York courts as creating compensable emotional distress. Thus, in the absence of such specific circumstances, Plaintiff must show danger to his physical safety or fear thereof to satisfy this element of his NIED claim. *Id.*

IV. CONCLUSION

Plaintiff's case was fully and fairly considered by an external investigator and disciplinary panel that followed HWS' policies in all material respects. There is no basis for interfering with those findings. The Amended Complaint should be dismissed.

Dated: September 26, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Angelo A. Stio, hereby certify that on September 26, 2016, I served a true and correct copy of the foregoing Defendant's Motion to Dismiss Plaintiff's Amended Complaint, Memorandum of Law in Support, and proposed Order, via Federal Express and email, upon the following persons:

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